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## ACCORD AND SATISFACTION.

"FROM time immemorial the acceptance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against the wrong-doer."<sup>1</sup> As this doctrine arose long before the validity of simple contracts was recognized, it is obvious that it was not by virtue of any preliminary agreement or accord between the parties, but only by virtue of the ultimate acceptance of the satisfaction that the discharge was effected. The only importance of the accord was as evidence to prove that the performance relied upon by the defendant as satisfaction was actually received by the plaintiff as such. This would be proved as well by the plaintiff's offer to receive the thing as satisfaction as by a bilateral agreement between the parties by which the plaintiff promised to receive the thing as satisfaction and the defendant promised to give it. There was, therefore, no occasion to distinguish between a mere offer on the part of the plaintiff and a bilateral contract. The distinction is now, however, of great importance. If there is a mere offer or promise by the creditor to accept something as satisfaction and the debtor makes no promise to give it, the offer of the creditor is revocable at his pleasure and the rights of the parties are unchanged until the agreed satisfaction is actually given and received. This distinction is not always observed in the cases.<sup>2</sup> The word accord, to avoid confusion, should be used only to designate a bilateral contract, by which the defendant promises to give the proposed satisfaction, and the plaintiff promises to accept it.<sup>3</sup>

It might well be supposed that such an accord would have been recognized as a valid contract as soon as the validity of other bilateral contracts was recognized, but such was not the case.

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<sup>1</sup> 9 HARV. L. REV. 55, by Professor Ames, citing Y. B. 21 & 22 Edw. I. 586 (Rolls series); Y. B. Hen. VI. 25-13; Y. B. 34 Hen. VI. 43-44; *Andrew v. Boughey*, Dyer, 75, pl. 23.

<sup>2</sup> Cases in which there seems to have been merely an offer by the creditor are: *Wray v. Milestone*, 5 M. & W. 21; *Francis v. Deming*, 59 Conn. 108; *Harbor v. Morgan*, 4 Ind. 158; *Burgess v. Denison Mfg. Co.*, 79 Me. 266; *Cannon Rivers Assoc. v. Rogers*, 46 Minn. 376; *Hawley v. Foote*, 19 Wend. 516; *Keen v. Vaughan's Ex.*, 48 Pa. St. 477.

<sup>3</sup> Langdell, *Summ. Cont.* § 87.

The courts were doubtless led astray by the assumption that if the contract of accord was valid, it necessarily would be a defense to the original cause of action. Even burdened with this assumption, the Court of King's Bench said, in 1681,<sup>1</sup> that "though in Peyto's case, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed, 9 Co. 79 b, 3 Cro. 46, pl. 2, yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance; to which the court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given."

But this *dictum* being urged in the Common Pleas twenty years later in the case of *Allen v. Harris*<sup>2</sup> as a reason for holding an accord unexecuted a defense to an action, the court gave judgment for the plaintiff, saying: "If arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous that an accord ought to be executed that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration."

Accordingly in *Lynn v. Bruce*<sup>3</sup> breach of a bilateral agreement to give and receive a specified sum of money as satisfaction for a previous cause of action was held to give the plaintiff no right. Eyre, C. J., quoted from the case of *Allen v. Harris*, and gave his approval of the result for a reason not mentioned in the earlier cases. "*Interest reipublicae ut sit finis litium*. Accord executed is satisfaction, accord executory is only substituting one cause of action in the room of another, which might go on to any extent."

The decision of *Lynn v. Bruce* was correct upon its facts, since the accord was in that case merely an agreement to pay part of an admitted debt in satisfaction of the whole,<sup>4</sup> but no such ex-

<sup>1</sup> Case *v. Barber*, T. Ray. 450.

<sup>2</sup> *Allen v. Harris*, 1 Ld. Ray. 122.

<sup>3</sup> 2 H. Bl. 317.

<sup>4</sup> See, however, 13 HARV. L. REV. 38, by Professor Ames.

planation is possible in the case of *Reeves v. Hearne*.<sup>1</sup> Though the declaration in that case set forth mutual promises to do something of detriment to the promisor, and a breach of the defendant's promise, the court held on demurrer that no cause of action was stated. These cases have never been in terms overruled, and the fourth edition of *Leake on Contracts*<sup>2</sup> on their authority says: "The accord is in the nature of a mere offer which either party may refuse or withdraw; and upon which no action will lie."

Nevertheless it is hardly credible that *Reeves v. Hearne* would now be followed even in England. The case of *Crowther v. Farrer*,<sup>3</sup> though not purporting to overrule it, is in fact inconsistent with it, and allowed recovery of damages for breach of a contract to settle an existing liability by an agreed payment. Other decisions show clearly enough that if an agreement by way of accord is broken, an action may be maintained on the ordinary principles of contract.<sup>4</sup>

The more difficult question is, what effect does the unexecuted accord have upon the previous cause of action? So far as it is possible for the law to reach this result, the effect should be that which the parties intend. Generally no intention is definitely expressed, and it is necessary to resort to inference. When a creditor agrees to accept from his debtor something in satisfaction of the debt in consideration of the debtor's promise to give the satisfaction, it can hardly be supposed that the parties intended that the creditor should immediately have the right to proceed on his original claim, without giving the debtor a chance to give the agreed satisfaction. Temporary forbearance at least must have been contemplated, though not expressly promised. So that if no time is fixed by the parties for the performance of the accord, it is a natural inference that the parties intended that the creditor should forbear for a reasonable time; if a date is fixed by the parties for the performance of the accord, the inference is that the parties intended forbearance upon the original claim to last until that date. In some cases the circumstances show that the parties intended more than a temporary forbearance.

<sup>1</sup> 1 M. & W. 323. To the same effect is *Elliott v. Dazey*, 3 T. B. Mon. 268.

<sup>2</sup> P. 623.

<sup>3</sup> 15 Q. B. 677.

<sup>4</sup> *Nash v. Armstrong*, 10 C. B. N. s. 259; *Very v. Levy*, 13 How. 345, 349; *White v. Gray*, 68 Me. 579, 580; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144; *Hunt v. Brown*, 146 Mass. 253; *Palmer v. Bosley*, 62 S. W. Rep. 195 (Tenn. Ch.).

They may and sometimes do, in effect, agree that the original liability shall be immediately extinguished and the accord substituted in its place. But this is exceptional.

After the true construction of the accord is determined, its legal effect must be considered. Let it be supposed, first, that the accord was not intended immediately to satisfy and destroy the original cause of action, and further that the creditor, in violation of his agreement, brings action on the original cause before the time has arrived for the debtor to give the agreed satisfaction. If the debtor pleads the accord, the defense cannot be sustained.<sup>1</sup> To sustain it would lead to the result that even though the debtor subsequently failed to perform the accord, the creditor's claim would be barred, for judgment having once been given for the defendant on that very cause of action the matter has become *res judicata*. Of course, the creditor could sue upon the accord, but to limit his rights to this would in effect put him in the same position that he would have occupied if he had agreed to accept the accord and not its performance as the satisfaction of the debt. The rule of the common law, therefore, that an unexecuted accord is no defense is based on sound principles.

The case may be carried a step further. Suppose the debtor within the time agreed or within a reasonable time tenders performance of his promise, but the creditor in violation of his agreement refuses to accept the performance in satisfaction of his claim, and brings suit on the original cause of action. Here, too, the unexecuted accord is no defense.<sup>2</sup> The creditor's claim is not

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<sup>1</sup> Many decisions to this effect are collected in 1 Am. & Eng. Encyc. of Law (2d ed.) 422. A few recent cases are *Crow v. Kimball Lumber Co.*, 69 Fed. Rep. 61 (C. C. A.); *Crass v. Scruggs*, 115 Ala. 258; *Martin-Alexander Co. v. Johnson*, 70 Ark. 215; *Goble v. American Nat. Bank*, 46 Neb. 891; *Gowing v. Thomas*, 67 N. H. 399; *Arnett v. Smith*, 11 N. Dak. 55, 64. The decisions cited in the next note are *a fortiori* in point to the same effect.

<sup>2</sup> *Shepherd v. Lewis*, T. Jones, 6; *Lynn v. Bruce*, 2 H. Bl. 317; *Carter v. Wormald*, 1 Ex. 81; *Gabriel v. Dresser*, 15 C. B. 622; *Humphreys v. Third Nat. Bank*, 75 Fed. Rep. 852, 859; *Long v. Scanlan*, 105 Ga. 424; *Woodruff v. Dobbins*, 7 Blackf. 582; *Deweese v. Cheek*, 35 Ind. 514; *Young v. Jones*, 64 Me. 563; *White v. Gray*, 68 Me. 579; *Clifton v. Litchfield*, 106 Mass. 34; *Hayes v. Allen*, 160 Mass. 34; *Prest v. Cole*, 183 Mass. 283; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548, 549; *Clarke v. Dinsmore*, 5 N. H. 136; *Rochester v. Whitehouse*, 15 N. H. 468; *Kidder v. Kidder*, 53 N. H. 561; *Gowing v. Thomas*, 67 N. H. 399; *Russell v. Lytle*, 6 Wend. 390; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Tilton v. Alcott*, 16 Barb. 598; *Kromer v. Heim*, 75 N. Y. 574; *Hearn v. Kiehl*, 38 Pa. St. 147; *Blackburn v. Ormsby*, 41 Pa. St. 97; *Hosler v. Hursh*, 151 Pa. St. 415; *Clarke v. Hawkins*, 5 R. I. 219; *Carpenter v. Chicago, etc., Ry. Co.*, 7 S. Dak. 594; *Gleason v. Allen*, 27 Vt. 364.

But see *contra*, *Bradley v. Gregory*, 2 Camp. 383; *Very v. Levy*, 13 How. 345; *La-*

satisfied. Tender is not the same as performance. To assert such a doctrine is to say that the debtor after making his tender has satisfied his debt, though he is still the owner of the thing which was agreed upon as the satisfaction. Even in the rare case where the tender is not only made, but kept good by setting aside as the creditor's the proposed satisfaction, it involves an extension of the powers of a court of law to give relief. If the court holds that the debt was satisfied and that the tendered property became the property of the creditor by setting it aside for him, the court is doing more than merely ordering specific performance. It is holding that the debtor himself by his own action in appropriating the property to the creditor, in spite of the latter's express refusal to receive it, has himself specifically enforced the bargain transferring title to the creditor and extinguishing the original obligation. Doubtless the law of sales furnishes a certain analogy with such a result. In many jurisdictions a seller may, if the buyer in breach of his contract refuses to receive the goods agreed upon, set them aside for him and sue him for the full price, instead of damages for loss of the bargain,<sup>1</sup> but unless there is no way to work out a just result without such violation of fundamental legal distinctions the analogy should not be followed.

It is clear that the debtor has just reason to complain if the law allows the creditor to proceed at once with his original cause of action without giving the debtor an opportunity to satisfy it as the parties agreed in the accord. Recognized principles, however, suffice to protect the debtor. His grievance is that the creditor has broken the promise of temporary forbearance necessarily implied from the accord, and he should be entitled to the same redress that is allowed for breach of contracts for temporary forbearance where there is no agreement of accord. A covenant or other contract for temporary forbearance is not a good plea at law to an action brought in violation of the contract.<sup>2</sup> To allow such a plea and give judgment for the defendant would involve

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tapee *v.* Pecholier, 2 Wash. C. C. 180; Whitsett *v.* Clayton, 5 Col. 476; Jenness *v.* Lane, 26 Me. 475; Heirn *v.* Carron, 19 Miss. 361; Coit *v.* Houston, 3 Johns. Cas. 243 (overruled); Bradshaw *v.* Davis, 12 Tex. 336; Johnson *v.* Portwood, 89 Tex. 235, 239.

<sup>1</sup> Mechem on Sales, § 1694. In many jurisdictions, however, the seller cannot recover the full price unless the title to the goods had passed. *Ibid.*

<sup>2</sup> Ford *v.* Beech, 11 Q. B. 852; Ray *v.* Jones, 19 C. B. n. s. 416; Dow *v.* Tuttle, 4 Mass. 414; Perkins *v.* Gilman, 8 Pick. 229; Winans *v.* Huston, 6 Wend. 471. See, however, Walker *v.* Nevill, 34 L. J. Ex. 73; Slater *v.* Jones, L. R. 8 Ex. 186; Newington *v.* Levy, L. R. 5 C. P. 607, 6 C. P. 180.

the consequence that the plaintiff could never sue, though he had agreed to temporary forbearance only, and would be repugnant to the rule of the common law that if a cause of action is once suspended, it is gone forever; nor is there better ground for an equitable plea to the action, since equity would not grant a permanent injunction against the creditor's action, for the same difficulty that forbids upholding the plea as a legal defense is equally insuperable to an equitable defense. The defendant is entitled to delay, not to a defense on the merits. The debtor must, therefore, apply to a court of equity powers for a temporary injunction against the prosecution of the action, and such an injunction should be granted.<sup>1</sup> In the case of an accord there is a further difficulty. It will not greatly help the debtor to get a temporary injunction on the express or implied promise of the creditor to forbear if the creditor is permitted ultimately to refuse to accept the agreed satisfaction, and may then enforce his original cause of action. In order to give effectual relief, therefore, equity must specifically enforce the performance of the accord. As a court of law cannot give adequate relief, and as the promise of temporary forbearance necessarily included in the accord gives equity jurisdiction of the matter, there seems good reason for equity to deal with the whole matter by granting specific performance. Though there is strangely little authority upon the matter, and though in the few cases on the point the reasoning is not very full or satisfactory, the result here advocated seems to be justified by the decisions.<sup>2</sup>

Though an executory promise to give something in satisfaction of a cause of action cannot be while unperformed a legal bar to an action upon the original cause, the parties may, as has already been said, agree that an executory promise shall itself be the satisfaction of the old right; and if the claimant accepts a promise with that agreement, his original claim is at once and finally extinguished. Thereafter he must find his only remedy upon the new promise. This doctrine is modern,<sup>3</sup> and it may well be doubted whether early courts would have admitted the possi-

<sup>1</sup> *Compleat Attorney* (1st ed.) 325; *Blake v. White*, 1 Y. & C. Ex. 420, 424, 426; *Greely v. Dow*, 2 Met. 176, 178. See also *Bilington v. Wagoner*, 33 N. Y. 31; *Bomeisler v. Forster*, 154 N. Y. 229.

<sup>2</sup> *Very v. Levy*, 13 How. 345, 349; *Apperson v. Gogin*, 3 Ill. App. 48; *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144. See *Re Hatton*, L. R. 7 Ch. 723.

<sup>3</sup> *Good v. Cheesman*, 2 B. & Ad. 328 (1831), is regarded as the leading case on the point, but the doctrine was not clearly stated until after that decision.

bility, under any circumstances, of an executory simple contract extinguishing an existing cause of action;<sup>1</sup> but the principle seems logically correct, and is now well-settled law.<sup>2</sup>

It is often extremely difficult to determine as matter of fact whether the parties agreed that the new promise should be itself the satisfaction of the original cause of action, or whether they contemplated the performance of the accord as the satisfaction. Unless there is clear evidence that the former was intended, the latter kind of agreement must be presumed, for it is not a probable inference that a creditor intends merely an exchange of his present cause of action for another. It is generally more reasonable to suppose that he bound himself to surrender his old rights only when the new contract of accord was performed. The earliest decision in which it was held that the accord itself might operate as an extinguishment of the creditor's claim was on an agreement of composition;<sup>3</sup> and it is in such instruments perhaps that it is most frequently and naturally inferred that the intention of the parties was to substitute at once the right to the agreed composition for the old claims.

If such is the construction of the agreement, it must follow that even though the accord is never performed the creditor's right to sue on the old claim is lost. If, however, it is the performance of the accord which is to be the satisfaction of the claim, the creditor may, on default in performance of the accord by the debtor, sue either on the accord or on the original cause of action;<sup>4</sup> and similarly, if the creditor, contrary to his agreement,

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<sup>1</sup> The reason given by Eyre, C. J., in *Lynn v. Bruce*, 2 H. Bl. 317, against the validity of unexecuted accords generally, that they are merely "substituting one cause of action in the room of another," is obviously as applicable to an agreement which is itself to be satisfaction of a cause of action as to an agreement where the performance is to be the satisfaction.

<sup>2</sup> *Evans v. Powis*, 1 Ex. 601; *Buttigieg v. Booker*, 9 C. B. 689; *Edwards v. Hancher*, 1 C. P. D. 111, 119; *Acker v. Bender*, 33 Ala. 230; *Smith v. Elrod*, 122 Ala. 269; *Heath v. Vaughn*, 11 Col. App. 384; *Warren v. Skinner*, 20 Conn. 356; *Goodrich v. Stanley*, 24 Conn. 613; *Brunswick, etc., Ry. Co. v. Clem*, 80 Ga. 534; *Simmons v. Clark*, 56 Ill. 96; *Hall v. Smith*, 10 Ia. 45, 15 Ia. 584; *Whitney v. Cook*, 53 Miss. 551; *Yazoo, etc., R. Co. v. Fulton*, 71 Miss. 385; *Worden v. Houston*, 92 Mo. App. 371; *Gerhart Realty Co. v. Northern Assur. Co.*, 94 Mo. App. 356; *Frick v. Joseph*, 2 N. Mex. 138; *Perdew v. Tillma*, 62 Neb. 865; *Morehouse v. Second Nat. Bank*, 98 N. Y. 503; *Nassoiy v. Tomlinson*, 148 N. Y. 326; *Spier v. Hyde*, 78 N. Y. App. Div. 151; *Babcock v. Hawkins*, 23 Vt. 561. See also *Hunt v. Brown*, 146 Mass. 253. Compare *Campbell v. Hurd*, 74 Hun 235; *Wentz v. Meyersohn*, 59 N. Y. App. Div. 130; *Hosler v. Hursh*, 151 Pa. St. 415.

<sup>3</sup> *Good v. Cheesman*, 2 B. & Ad. 328.

<sup>4</sup> *Babcock v. Hawkins*, 23 Vt. 561.

sues on the original claim without giving opportunity for the performance of the accord, the debtor need make no attempt to use the accord as a ground for injunction, even though the local law permits him to do so, but may suffer judgment to go against him and resort to a separate action on the accord.<sup>1</sup>

A contract under seal presented some peculiar difficulties. The maxim "*Nihil tam conveniens est naturali aequitate, ut unumquodque dissolvi eo ligamine quo ligatum est,*" seemed to forbid discharge by accord and satisfaction as completely as by mere parol agreement. Blake's case,<sup>2</sup> however, decided that a right of action for unliquidated damages for breach of covenant could be discharged in this way. The court distinguished the case from that of a covenant to pay a sum of money. "For there is a difference, when a duty accrues by the deed in certainty, *tempore confectionis scripti*, as by covenant, bill, or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing;<sup>3</sup> and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty, but when no certain duty accrues by the deed, but a wrong or default subsequent, together with the deed, gives an action to recover damages which are only in the personalty for such wrong or default, accord with satisfaction is a good plea."<sup>4</sup>

Before breach of a covenant, not only was a parol agreement ineffectual to discharge it, but even though property were accepted in satisfaction the covenant was not discharged, whether the covenant was for the payment of money<sup>5</sup> or for the performance of some duty, breach of which would sound in damages.<sup>6</sup> Doubtless equity would, if necessary, enjoin the enforcement of any kind of bond<sup>7</sup> where satisfaction had been given either before or after maturity. The acceptance of property in satisfaction necessarily

<sup>1</sup> Hunt v. Brown, 146 Mass. 253.

<sup>2</sup> 6 Coke 436.

<sup>3</sup> In further illustration of the theory of our early law, that an obligation to pay money was an immediate conveyance or grant, rather than merely an executory promise to do something in the future, see Langdell, Sum. Cont. § 100; Pollock & Maitland, Hist. of Eng. Law (2d ed.) ii. 205; 8 HARV. L. REV. 252; 14 *idem* 429.

<sup>4</sup> See to the same effect Herzog v. Sawyer, 61 Md. 344, 352; Cabe v. Jameson, 10 Ired. L. 193; Smith v. Brown, 3 Hawks 580.

<sup>5</sup> Spence v. Healey, 8 Ex. 668.

<sup>6</sup> Kaye v. Waghorne, 1 Taunt. 428; Berwick v. Oswald, 1 E. & B. 295; Harper v. Hampton, 1 H. & J. 622, 673; Smith v. Brown, 3 Hawks 580.

<sup>7</sup> Steeds v. Steeds, 22 Q. B. D. 537; Nash v. Armstrong, 10 C. B. N. S. 259; Hurlbut v. Phelps, 30 Conn. 42; McCreery v. Day, 119 N. Y. 1.

imports an agreement never to enforce the original obligation, and covenants to forbear perpetually were early given effect to as a defense, even by courts of law. The reason sometimes given is that such a covenant amounts to a release.<sup>1</sup> The more accurate reason, however, and that generally given in the books, is that circuity of action is thereby avoided.<sup>2</sup> This latter reason is as applicable to the case of a parol contract never to sue as to the case of a covenant not to sue, so that it would seem that even a court of law might well have held satisfaction before breach a defense. There can now be no doubt that wherever equitable defenses are allowed at law, there would now be a good defense to an action at law on the covenant, and probably few courts would hesitate to accept such a defense, even though no statute had authorized the general use of equitable pleas.<sup>3</sup>

A debt of record presented a difficulty similar to that of a debt by specialty. Accordingly it could not be discharged at common law even by payment. By Statute of 4 Anne, c. 16, § 12, this was changed in England. The English statute may be regarded as part of the American common law inheritance, but it did not cover the case of accord and satisfaction, and that has been held within comparatively recent times to constitute no defense to an action on the judgment.<sup>4</sup> It may be doubted, however, whether these decisions would now be followed anywhere. The Supreme Court of the United States, though it holds itself obliged to preserve the distinctions between law and equity as they existed a century ago, has held the defense good,<sup>5</sup> and other decisions are to the same effect.<sup>6</sup>

<sup>1</sup> *Deux v. Jefferies*, Cro. Eliz. 352.

<sup>2</sup> *Hodges v. Smith*, Cro. Eliz. 623; *Lacy v. Kynaston*, 2 Salk. 575, s. c. 1 Ld. Ray. 690; 12 Mod. 551; *Ford v. Beech*, 11 Q. B. 852, 871. See also *Smith v. Mapleback*, 1 T. R. 441, 446; *Ledger v. Stanton*, Johns. & H. 687.

<sup>3</sup> *Green v. Wells*, 2 Cal. 584; *McDonald v. Mountain Lake Co.*, 4 Cal. 335; *Worrell v. Forsyth*, 141 Ill. 22 (see also *Starin v. Kraft*, 174 Ill. 120; *Jones v. Chamberlain*, 97 Ill. App. 328); *Monroe v. Perkins*, 9 Pick. 298; *Savage v. Blanchard*, 148 Mass. 348; *Siebert v. Leonard*, 17 Minn. 433, 436; *Armijo v. Abeytia*, 5 N. Mex. 533, 545; *Reichel v. Jeffrey*, 9 Wash. 250.

Cases where a parol agreement to rescind or discharge a sealed contract is held effectual, also *a fortiori* imply that accord and satisfaction would be good.

<sup>4</sup> *Riley v. Riley*, 20 N. J. Law (Spencer) 114; *Mitchell v. Hawley*, 4 Denio 414; *Garvey v. Jarvis*, 54 Barb. 179.

<sup>5</sup> *Boffinger v. Tuyes*, 120 U. S. 198, 205.

<sup>6</sup> *Re Freeman*, 117 Fed. Rep. 680, 684; *Jones v. Ransom*, 3 Ind. 327; *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Savage v. Blanchard*, 148 Mass. 348; *Weston v. Clark*, 37 Mo. 568, 572; *Fowler v. Smith*, 153 Pa. St. 639; *Reid v. Hibbard*, 6 Wis. 175.

Though the defense of accord and satisfaction was recognized long before the doctrine of consideration was developed, the requirements for a legally effective satisfaction became confused and regarded as identical with the requirements for the consideration of a promise. As an accord and satisfaction is an executed transaction, and as the validity of the satisfaction as a discharge of the previous cause of action cannot have rested on any view that the satisfaction was rather the consideration of a promise of perpetual forbearance than a technical extinction of the old cause of action, the essentials of consideration and of satisfaction might well have varied. But it was not unnatural that what had been regarded as inadequate to work a satisfaction of a cause of action should also have been regarded as insufficient consideration, and later that whatever was insufficient consideration should be inadequate also for the satisfaction of a cause of action. Brian, C. J., said in 1455 of an attempted satisfaction by part payment: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand."<sup>1</sup> This doctrine soon became settled law, but Coke at least expressly distinguished the doctrine of consideration, and held that though part payment of a debt could not in the nature of things be a satisfaction of the debt, it might be consideration for a promise.<sup>2</sup> Lord Ellenborough, however, made no such distinction, and regarded, apparently, consideration as a test both for satisfaction and for executory contract. "There must be some consideration for the relinquishment of the residue; something collateral to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*."<sup>3</sup>

In *Cumber v. Wane*,<sup>4</sup> Pratt, C. J., said: "It must appear to the court to be a reasonable satisfaction; or at least the contrary

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Accord and satisfaction was held a good plea to an action on a foreign judgment in *Hardwick v. King*, 1 Stew. (Ala.) 312.

<sup>1</sup> Y. B. 33 Hen. VI. 48 A. pl. 32; 12 HARV. L. REV. 521.

<sup>2</sup> *Bagge v. Slade*, 3 Bulst. 162.

<sup>3</sup> *Fitch v. Sutton*, 5 East 230, 232. The early cases are stated and discussed by Professor Ames, in 12 HARV. L. REV. 524.

<sup>4</sup> 1 Stra. 426.

must not appear." But in modern cases no such test is applied. The same rule that governs the formation of contracts — that the adequacy of the consideration is for the parties — governs the satisfaction of causes of action. Thus in *Cooper v. Parker*,<sup>1</sup> Parke, B., said: "The court cannot enter into a consideration of the value of the satisfaction, which upon the face of it is uncertain." So in *Curlewis v. Clark*, an incomplete bill of exchange was held a good satisfaction; Alderson, B., saying: "We cannot value the signature of the Earl of Mexborough; possibly it may be worth something as an autograph."<sup>2</sup>

Though the common case where an agreed satisfaction is held ineffectual for lack of consideration arises when part of a liquidated and undisputed debt has been paid,<sup>3</sup> doubtless decisions on other facts would turn on similar principles.<sup>4</sup> Thus where performance of a duty other than a debt is held insufficient consideration to support a promise, such performance would also be held insufficient to satisfy any cause of action. The legal requirements in this respect for a valid satisfaction should, therefore, be sought under the heading of consideration.

It seems obvious that nothing can operate as a satisfaction, unless both debtor and creditor agree that it shall, but there is one commonly recurring state of facts where this principle seems to be lost sight of by many courts. The case is this: A debtor sends to a creditor whose claim is unliquidated or disputed a check with a letter stating that the check is sent in full satisfaction of the claim, and that if the creditor is unwilling to accept it as such he must return it. The creditor takes the check, but immediately writes a letter stating that he refuses to accept the check as full satisfaction, but will apply it in reduction of the indebtedness. Upon these facts the English Court of Appeal held that there was no satisfaction of the cause of action,<sup>5</sup> and a few jurisdictions in the United States have made the same ruling.<sup>6</sup> But the great weight of authority in the United States is to the con-

<sup>1</sup> 15 C. B. 822, 828.

<sup>2</sup> 3 Ex. 375, 379. See also *Reed v. Bartlett*, 19 Pick. 273.

<sup>3</sup> See these cases collected and distinctions discussed in 12 HARV. L. REV. 525 *et seq.*; 1 Am. & Eng. Encyc. 413 *et seq.*

<sup>4</sup> Leake on Contracts (4th ed.) 622.

<sup>5</sup> *Day v. McLea*, 22 Q. B. D. 610.

<sup>6</sup> *Louisville, etc., Ry. Co. v. Helme*, 22 Ky. L. Rep. 964; *Rosenfield v. Fortier*, 94 Mich. 29. See also *Mortlock v. Williams*, 76 Mich. 568; *Krauser v. McCurdy*, 174 Pa. St. 174; *Rapp v. Giddings*, 4 S. Dak. 492.

trary.<sup>1</sup> It is said that the acceptance of the check necessarily involves an acceptance of the condition upon which it was tendered.

If the parties are dealing orally with one another and the debtor offer the creditor a check in full satisfaction which the creditor takes, it must be inferred that he assents to the terms. If the creditor refuses to receive the check in full satisfaction and yet takes it, either he must have assented to the terms, or the debtor must have assented to the creditor's refusal, for the voluntary giving of the check by one, and the taking it by the other, if neither misunderstood the words that were spoken, necessarily indicate assent,<sup>2</sup> and it becomes a question of fact, what the bargain was to which they assented. But if the debtor laid down the check and departed, saying, if this is taken it is full satisfaction, it is hard to see why the creditor may not steal or convert the check. Doubtless, if he take the check, saying nothing, his taking will be equivalent to an expression of assent to the offer, whatever his mental intent,<sup>3</sup> and even if he indicate by some act or word at the time that he takes the check that his intention is not to treat the debt as satisfied, he should still be regarded as assenting to the terms of the debtor's offer, for under the circumstances the debtor has reason to suppose that the taking of the check is an expression of assent unless informed to the contrary.<sup>4</sup> But if as soon as

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<sup>1</sup> *Potter v. Douglas*, 44 Conn. 541; *Hamilton v. Stewart*, 108 Ga. 472; *Ostrander v. Scott*, 161 Ill. 339; *Lapp v. Smith*, 183 Ill. 179; *Bingham v. Browning*, 197 Ill. 122; *Michigan Leather Co. v. Foyer*, 104 Ill. App. 268; *Talbott v. English*, 156 Ind. 299, 313; *Neely v. Thompson*, 75 Pac. Rep. 117 (Kan.); *Anderson v. Standard Granite Co.*, 92 Me. 429, 432; *Fremont Foundry Co. v. Norton*, 92 N. W. Rep. 1058, 1060 (Neb.); *Nassoii v. Tomlinson*, 148 N. Y. 326; *Logan v. Davidson*, 162 N. Y. 624; *Lewinson v. Montauk Theatre Co.*, 60 N. Y. App. Div. 572; *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489; *Petit v. Woodlief*, 115 N. C. 120; *Hull v. Johnson*, 22 R. I. 66; *McDaniels v. Rutland*, 29 Vt. 230; *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239. See also *Bull v. Bull*, 43 Conn. 455; *Cooper v. Yazoo, etc.*, R. Co., 35 So. Rep. 162 (Miss.); *Pollman Coal Co. v. St. Louis*, 145 Mo. 651; *McCormick v. St. Louis*, 166 Mo. 315, 335; *Perkins v. Hadley*, 49 Mo. App. 556. As to the necessity of an explicit statement that the check sent is intended as full payment, compare *Fremont Foundry Co. v. Norton*, 92 N. W. Rep. 1058 (Neb.); *Whitaker v. Eilenberg*, 70 N. Y. App. Div. 489; *Amer v. Folk*, 28 N. Y. Misc. 508; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551; *Van Dyke v. Wilder*, 66 Vt. 583.

<sup>2</sup> *Cooper v. Yazoo, etc.*, Ry. Co. 35 So. Rep. 162 (Miss.). See also *Porter v. Cook*, 114 Wis. 60.

<sup>3</sup> *Keck v. Hotel Owners' F. I. Co.*, 89 Ia. 200.

<sup>4</sup> *Hull v. Johnson*, 22 R. I. 66. In this case the debtor wrote on the check: "Good only . . . if endorsed in full of all demands." The creditor struck this out and cashed the check. The court said: "The erasure on the check was not made in the presence

the check is taken notice is promptly given to the debtor that it is not taken as satisfaction, it seems impossible to find the elements of a bargain. The most forcible argument upon the other side is that the creditor should not be allowed to assert his tortious conversion of the check, though the effect of such a ruling is to fix upon the creditor a bargain which he never made. The case of sending the check by mail is essentially the same as that just discussed, in that the creditor is given the power in fact to take the check without making an agreement with the debtor, though forbidden to exercise such power.

The question whether accord and satisfaction entered into by the creditor with a person other than the debtor discharges the debt has been much disputed. Even though the third person pays in money the exact amount of the debt there can in strictness be at most an accord and satisfaction, for, as payment by A is a different thing from payment by B, the obligation has not been performed according to its tenor. In the early case of *Grymes v. Blofield*<sup>1</sup> the defendant pleaded to an action of debt satisfaction given by a third person, but it was held no plea. This is inconsistent with a still earlier case thus stated by Fitzherbert:<sup>2</sup> "If a stranger doth trespass to me and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" *Grymes v. Blofield* was followed in *Edgcombe v. Rodd*,<sup>3</sup> and though its correctness seems to have been doubted in *Jones v. Broadhurst*,<sup>4</sup> where Cresswell, J., considered the question elaborately, the English law was settled soon after by several cases thus summarized by Baron Parke in *Simpson v. Eggington*:<sup>5</sup>

"The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of *Jones v. Broadhurst*, 9 C. B. 193; *Belshaw v. Bush*, 11 C. B.

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of the defendants, and could not have been known to them until the check had reached their bank and had been paid. The plaintiff gave them no notice of his rejection of their offer, but took their money."

<sup>1</sup> Cro. Eliz. 541. This case is elaborately considered in *Jones v. Broadhurst*, 9 C. B. 173, 195 *et seq.*, and the result of an examination of the original rolls is stated.

<sup>2</sup> Tit. "Barre," pl. 166.

<sup>3</sup> 5 East 294. See also *Thurman v. Wild*, 11 A. & E. 453.

<sup>4</sup> 9 C. B. 173, 193.

<sup>5</sup> 10 Ex. 844.

191, and *James v. Isaacs*, 22 L. J. C. P. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by the third person, as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In *Belshaw v. Bush*, it was decided that a payment by a stranger considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case of *James v. Isaacs*, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant, was held to be bad."<sup>1</sup>

In *Simpson v. Eggington*<sup>2</sup> it was held that ratification might be made at the trial of such an action.

In the United States the weight of authority sustains the validity of the defense,<sup>3</sup> though wherever there is any evidence that the payment or satisfaction was made on behalf of the debtor and was ratified by him, these facts are relied upon.<sup>4</sup> In New York, however, the strictness of the early English law has been maintained,<sup>5</sup> and a similar result has been reached in Kentucky<sup>6</sup> and Missouri.<sup>7</sup>

The difference in the authorities is of less importance than it might seem on first consideration. The courts which require the satisfaction to be made on behalf of the debtor and ratified by him

<sup>1</sup> See in accord with *James v. Isaacs*, *Kemp v. Balls*, 10 Ex. 607; *Lucas v. Wilkinson*, 1 H. & N. 420.

<sup>2</sup> 10 Ex. 844.

<sup>3</sup> *Harrison v. Hicks*, 1 Port. (Ala.) 423; *Underwood v. Lovelace*, 61 Ala. 155; *Martin v. Quinn*, 37 Cal. 55; *White v. Cannon*, 125 Ill. 412; *Poole v. Kelsey*, 95 Ill. App. 233, 240; *Ritenour v. Mathews*, 42 Ind. 7; *Binford v. Adams*, 104 Ind. 41; *Thompson v. Conn. Mut. L. I. Co.*, 139 Ind. 325, 345; *Harvey v. Tama County*, 53 Ia. 228; *Porter v. Chicago, etc., Ry. Co.*, 99 Ia. 351, 359; *Oliver v. Bragg*, 15 La. Ann. 402; *Leavitt v. Morrow*, 6 Oh. St. 71; *Royalton v. Cushing*, 53 Vt. 321, 326; *Gray v. Herman*, 75 Wis. 453.

<sup>4</sup> See the careful opinions in *Snyder v. Pharo*, 25 Fed. Rep. 398, and *Jackson v. Pennsylvania R. Co.*, 66 N. J. Law 632.

<sup>5</sup> *Clow v. Borst*, 6 Johns. 37; *Daniels v. Hallenbeck*, 19 Wend. 408; *Bleakley v. White*, 4 Paige 654; *Muller v. Eno*, 14 N. Y. 597, 605; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Dusenbury v. Callaghan*, 8 Hun 541, 544. Cf. *Hun v. Van Dyck*, 26 Hun 567; affirmed without opinion, 92 N. Y. 660. See also *Wellington v. Kelly*, 84 N. Y. 543; *Knapp v. Roche*, 92 N. Y. 329, 334.

<sup>6</sup> *Stark's Adm. v. Thompson's Ex.*, 3 T. B. Mon. 296, 302.

<sup>7</sup> *Armstrong v. School District*, 28 Mo. App. 169. See also *Carter v. Black*, 4 Dev. & Batt. 425, 427.

are disposed to find these facts upon rather slight evidence. The difficulty is generally that the third person did not purport to act on behalf of the debtor. If the payment was so made as to be capable of ratification, there can be no difficulty so far as the debtor himself is concerned in making out such ratification. The mere assertion by the debtor that the debt has been satisfied though made by plea or at the trial after action has been brought on the debt is sufficient. If the question whether the debt has been paid comes in issue between the creditor and third persons, then indeed trouble may arise over the question of ratification.

Even though satisfaction from a third person does not legally discharge the obligation, there may be ground for an equitable defense. There must be implied from the creditor's acceptance of the satisfaction a promise to forbear perpetually to sue the original debtor. Whether the original debtor can enforce this promise in any jurisdiction should depend upon the doctrines there held in regard to the enforcement by third persons of contracts for their benefit or for the discharge of obligations due to them.<sup>1</sup> If the promise is enforceable by the original debtor, either a permanent injunction or an equitable plea at law is an appropriate remedy.

It has been held in England that before ratification by the debtor, it is competent for the creditor and the third person to rescind their arrangement, and the original debtor will then still continue liable.<sup>2</sup> In this case, too, if it be granted that satisfaction by a third person is not a legal discharge, the correctness of the result depends on the doctrine held as to the right of parties to a contract in which a third person is interested, to rescind it.<sup>3</sup>

*Samuel Williston.*

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<sup>1</sup> See 15 HARV. L. REV. 767; *Armstrong v. School District*, 28 Mo. App. 169.

<sup>2</sup> *Walter v. James*, L. R. 6 Ex. 124. In this case the creditor when he received payment thought that it was authorized by the debtor, and the fact that he accepted the payment under this mistake had weight with the court.

<sup>3</sup> See 15 HARV. L. REV. 799.